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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 434

UNITED TRANSPORTATION UNION, as successor to the BROTHERHOOD OF RAILROAD TRAINMEN,
Petitioner,

vs.

THE STATE BAR OF MICHIGAN
Respondent.

BRIEF FOR RESPONDENT

A. D. RUEGSEGGER,
Suite 1500, One Woodward Ave.,
Detroit, Michigan 48226

PHILLIP C. KELLY,
Kelly, Kelly & Kelly,
210 West Franklin Street,
Jackson, Michigan 49201
Attorneys for Respondent.

Of Counsel:
LOUIS ROSENZWEIG,
600 Woodward Avenue,
Detroit, Michigan 48226

Interstate Brief & Record Co., 1036 Beaubien St., Detroit, Michigan 48226
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COUNTER-STATEMENT OF QUESTIONS PRESENTED

I.

Does a state court injunction violate rights guaranteed by the First and Fourteenth Amendments to the Constitution of the United States, when it enjoins a railroad trainmen's union from: (1) Furnishing legal advice; (2) Informing lawyers that an accident has occurred and the identity of the injured persons for the purpose of obtaining legal employment; (3) Suggesting that the recommended lawyer will advance expenses pending settlement; (4) Controlling the fees charged by the lawyer; (5) Accepting compensation for solicitation of legal employment; (6) Sharing in

the legal fees of the lawyer; and (7) Sharing in any recovery?

II.

Does a Michigan Judgment enjoining a railroad trainmen's union from the acts specified in question I entered in 1968 upon remand from the Michigan Supreme Court in light of the decision of this court in *Brotherhood* without taking additional testimony violate due process when the prior Injunction Decree, more comprehensive in scope, entered after a full hearing, contains substantially all of the injunctive provisions provided in the later 1968 injunction?

COUNTER-STATEMENT

Respondent desires to correct certain inaccuracies and insufficiencies contained in the following subdivisions of Petitioner's "Statement".

a. The Relevant Pleadings and how the Constitutional Question were Raised

The statement that the Brotherhood contended in its answer to the complaint that the application of the Michigan statute to its plan of referring members to union counsel was "contrary to rights granted the Brotherhood under the Federal Constitution (A. 18)" (Br. p. 5) is technically correct but misleading. The claim was that such application was in violation of the Interstate Commerce Clause of the Constitution (Article 1, Sec. 8) and the Supremacy Clause (Article VI, Clause 2) (A. 18) rather than the constitutional guarantees of the First and Fourteenth Amendments involved in this case.

The injunction sought by plaintiff in its complaint was directed to solicitation of F.E.L.A. cases for the benefit of Edward B. Henslee, and associates, or any other of the Regional Counsel of defendant or any other attorney or attorneys (A. 11). In its Pre-Trial Statement, plaintiff claimed it was entitled to an injunction against "solicitation" of such claims within the State of Michigan "for the benefit of out-of-state lawyers, particularly defendants Henslee and Naughton, named herein." (A. 29) In defendant Brotherhood's Concise Statement of Defense it made the additional claims that neither the plaintiff nor the public of the State of Michigan have any property right in F.E.L.A. claims or cases occurring in Michigan and that even if the public had property rights in such cases the plaintiff was not a proper party to enforce such rights (A. 32). No mention was made in the statement of the First and Fourteenth Amendments to the Constitution but merely the general statement that the defendant's rights are governed by "Federal Statutes, the Federal Constitution, and considerations of public policy" (A. 33).

b. The trial and the exhibits.

As pointed out in respondent's Brief in Opposition to the Petition for Writ of Certiorari the partial quotation appearing at the top of page 7 of such petition and again at the bottom of page 5 of petitioner's present brief is misleading. Earlier in his opening statement (A. 54) counsel for respondent said:

> "As the pleadings stand, * * * we believe that substantially all of the allegations of the bill of complaint, all of the material allegations in the bill of complaint, are admitted except as to paragraph 9 alleging that large numbers of cases and claims of members of the Brotherhood of Railroad Train-

men residing in Michigan * * * have been unlawfully and improperly solicited * * *"

Later at A. 60 respondent's counsel stated:

"If the court please, that concludes our presentation under the heading of issues in dispute, and we will refer to Mr. Lumley if he cares to make an opening statement. If not, we are prepared to proceed with our proof under paragraph 9 which is in dispute."

Then at A. 61, the following statement was made which included the twice quoted sentences:

"Mr. Kelly: I offered Exhibits 1 and 2. They are part of the pleading in the Illinois Supreme Court on behalf of the defendant Brotherhood, as explanatory of the matters which are, we admitted in the pleadings; but as a different—the statements published in those records which are also in the pleadings. We haven't offered any proof as to disputed matters. We do not intend to. However, we are ready to go ahead with proof if counsel does not want to make an opening statement. (A. 61)

* * * * *

"Mr. Kelly: But I stated to the Court that those matters were not in dispute and were admitted in the pleadings, and I was going to state them in the record for the purpose of assisting the Court in making the findings of facts.

"We are ready to go ahead.

"The Court: Let's get on with the proofs.

"Mr. Kelly: With our proofs, if counsel doesn't want—

"Mr. Lumley: May I have a ruling on my motion to strike?

"The Court: Your motion to strike is denied." (A. 62)

Immediately following this colloquy, respondent called David J. Walsh to testify as to the disputed matters in paragraph 9 (A. 62). The foregoing clearly shows that respondent was not only ready to but did proceed to prove the only disputed matters in issue in this case.

c. The 1962 decision and decree.

Although the trial court stated that the "* * * recommendation of counsel by the Brotherhood is the nub of the proceedings * * *" (A. 111), the decree quite properly enjoined petitioner from several additional improper and illegal activities such as engaging in the practice of law, accepting pay from lawyers, etc (A. 117, 118).

e. Proceedings on remand.

The brief partial statement quoted in the first paragraph on page 8 of petitioner's brief does not fully express respondent's position as to amendment of the complaint at that time. The following is the complete excerpt from the February 5, 1965 hearing on this subject: (A. 180)

> "It is my belief--I think Mr. Hall concurs in it—that the plaintiff does not care to amend the complaint; but we are informed tthat the Trial Court in the Virginia case has filed an opinion and entered an amended decree pursuant to the remand from the United States Supreme Court in that case.
>
> I believe that the plaintiff * * * will, with leave of the Court, for which we pray, present this Court a further brief directed to the revision of the decree of this Court on terms not inconsistent with the United States Supreme Court opinion in the Virginia case.
>
> * * * * *

"Mr. Kelly: * * * (A.183)

"I do not say to the Court here this morning that the State Bar will not or might not amend its complaint if that should appear necessary or proper in the course of the proceedings.

"At the present time, it is the mind of the State Bar, through its counsel, that the record in this case as made will support a decree granting relief to the State Bar in somewhat altered terms, perhaps, than those of the existing decree and not inconsistent with the United States Supreme Court opinion in the Virginia case."

Thereupon the court ordered the parties to present briefs outlining their respective positions (A. 184-5).

ARGUMENT

I.

THE MAJORITY OF THE MICHIGAN SUPREME COURT SUSTAINING THE DECRETAL JUDGMENT OF THE TRIAL COURT ENJOINING THE UNION IN THE SEVEN RESPECTS SET FORTH IN COUNTER-STATEMENT NO. 1 DOES NOT VIOLATE THE UNION'S RIGHTS OF FREEDOM OF SPEECH, PETITION AND ASSEMBLY UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE FEDERAL CONSTITUTION.

Petitioner commenced its argument in its Petition for a Writ of Certiorari by stating that the Decretal Judgment herein involved was entered "* * * with the purpose of interfering with the railroad workers in the exercise of their constitutional rights" (Pet. p. 11). Now petitioner claims that the Decretal Judgment "necessarily interferes with the operation of the union plan of recommending union

counsel to its members" (Br. p. 15). This contention is apparently made because of the fact that the Decretal Judgment "causes the union members in Michigan to be faced with the possibility of a contempt citation if they misinterpret the meaning or effect of the vague injunctive provisions." (Br. p. 15) Respondent submits that the provisions of the Decretal Judgment are neither vague nor subject to misinterpretation. The contention was made in the Petition for Writ of Certiorari that the Michigan court blindly followed the decision and judgment of the Virginia courts and that although both the Virginia Supreme Court of Appeals and the court below recognized that this Court had held the petitioner's basic plan must not be affected or forbidden and that the lawyers involved must be accorded "a like protection" the court below failed to discuss the injunctive provisions in light of this admonition "but instead defers to the 1966 opinion of the Virginia Supreme Court of Appeals." (Pet. p. 11) Now the petitioner claims that the injunctive provisions, exactly duplicative of the final Virginia decree, and which have been in effect since June, 1966, are vague and subject to misinterpretation. If the Virginia decree has not chilled "the exercise of the constitutional rights" of the petitioner and its members in Virgina, certainly such fear and contention is nonexistent in the State of Michigan.

It is submitted that there is no foundation to petitioner's contention that the provisions of the Michigan Decretal Judgment, as well as the like provisions of the Virginia decree, are "types of provisions that this Court addressed itself to" in *Brotherhood of Railroad Trainmen v. Virginia,* 377 U.S. 1, 7, when this Court said that "A state could not, by invoking the power to regulate the professional conduct of attorneys, infringe in any way the right of individuals and the public to be fairly represented in law-

suits authorized by Congress to effectuate a basic public interest." (Br. p. 15, 16) After this Court vacated the original 1962 Virginia decree, the Virginia Supreme Court of Appeals remanded the case to the Chancery Court of the City of Richmond "for proceedings not inconsistent with the majority opinion of the Supreme Court." (*Brotherhood of Railroad Trainmen v. Commonwealth of Virginia ex rel. Virginia State Bar*, 207 Va. 182, 149 S.E. 2d 265 (1966)). The Chancery Court, after argument, entered a new injunction on January 15, 1965, which differed in certain respects from the 1962 decree. Upon appeal from this 1965 decree, the Virginia Supreme Court of Appeals rendered its opinion (205 Va. 182) setting forth, in footnote 4, the 1965 decree in toto, with certain provisions thereof put in italics for emphasis. The holding of the Virginia court was to delete the emphasized words as being repugnant to the decision of this Court in *Brotherhood*. The "modified decree" thereupon entered in 1967 became the final decree of the Virginia courts in conformity with what the court of last resort of that state had determined would be consistent with this Court's holding in *Brotherhood*. It is accordingly a specious argument to contend that the provisions of the injunction here at issue are violations of the holding of this Court in *Brotherhood*.

The principal thrust of petitioner's argument under Sec. I of its brief is that the Supreme Court of Appeals of Virginia, as well as the Michigan Court, in effect, gave only lip service to the holding of this Court in *Brotherhood*. By footnotes in both the Petition (p. 12) and in its brief (p. 18) petitioner comments that it endeavored to appeal from the final 1967 injunction but to no avail, the Virginia Supreme Court of Appeals holding that such would, in essence, be an appeal from its own former decision. Petitioner states (p. 18) that the dubious value of the

decision of the Virginia Supreme Court was pointed out to the court below and earlier stated: (Pet. Rep. Br. to Resp. Br. Oppos. p. 4) "petitioner, of course, contends that the Virginia court erred * * *". Certiorari having been granted here, this Court has the opportunity to (1) resolve the petitioner's contentions of unconstitutionality of the Virginia court's decision, (2) afford petitioner the determination of which it contends it has previously been deprived on technical grounds, and (3) clarify and set at rest the concern of at least one member of the Virginia court, Justice Carrico, who stated in his dissenting opinion:

> "* * * I do not agree that the labor union involved in this case should be permitted to solicit legal business for its sixteen regional counsel and I cannot believe that the United States Supreme Court ever intended such a result to ensue.
>
> * * * * *
>
> "The decree of the chancellor respects the union's recently declared right to advise injured workers to obtain legal advice and to recommend specific lawyers. The decree forbids solicitation. I would affirm the actions of the chancellor in those respects.
>
> "I would leave it up to the Supreme Court itself to extend its ruling to permit the union to solicit legal business, if that was its intention in the first place. While my powers of prescience are no better than my abilities of clairvoyance, I believe that there is a good chance that the Court, if given the opportunity, will say that it had no such intention." (207 Va. 192-3)

Contrary to the position taken by petitioner, respondent submits that the Supreme Court of Virginia gave full effect to the decision of this Court in *Brotherhood*. The 1965 Richmond Chancellor's decree had attempted to dis-

tinguish between solicitation and recommendation and had enjoined "solicitation". But to give full expression to the decision of this Court, the Virginia Supreme Court of Appeals struck down any such distinction and held that regardless of terminology, the union should be free to pursue its established plan. The excerpt from the Virginia court's opinion (207 Va. at 189) quoted on pages 9-10 of respondent's Brief in Opposition clearly shows the length to which the Virginia court went in this regard.

On pages 23-27 of petitioner's brief, the injunctive provisions of the Michigan decree are discussed with certain references to a corresponding but contrary analysis of the same in respondent's prior Brief in Opposition appearing on pages 11-14. Respondent's position as to these provisions in light of the additional discussion appearing in petitioner's brief is as follows:

a. Furnishing legal advice.

Petitioner contends (Br. p. 23) that this provision flies squarely in the face of this Court's holding in *Brotherhood* and in support thereof quotes a paragraph from this Court's opinion at 377 U.S. 5, 6. It was respondent's contention in its Brief in Opposition that this provision was tantamount to a prohibition against "furnishing legal advice" which in plain language means the practice of law. Petitioner somehow confuses such a prohibition with one that interferes with the exercise of the constitutionally protected rights of union members to "talk together freely as to the best course to follow" and to "select a spokesman from their number who could be expected to give the wisest counsel." Petitioner states that this constitutionally protected right cannot be performed freely and with impunity when an injunction prohibits the "furnishing of legal advice." Respondent submits, as it has previously done, that

this injunctive provision merely prohibits the practice of law by the union (an association of non-lawyers) which clearly falls "within the traditional purview of state regulation of professional conduct." *N.A.A.C.P. v. Button*, 371 U.S. 415, 438, 9 L. ed. 2d 405, 421 (1963). "That the states have broad powers to regulate the practice of law is, of course, beyond question. See *Trainmen, supra*, at 6, 12 L. ed. 2d at 93, 11 ALR 3d 1196." *United Mine Workers v. Illinois Bar Association*, 389 U.S. 217, 19 L. ed. 2d 426, 88 S. Ct. 353 (1967). Such broad power of regulation, which necessarily includes the power to exclude, is subject only to the requirement that constitutional guarantees of due process and equal protection be observed. *Schware v. Board of Bar Examiners*, 353 U.S. 232, 1 L. ed. 2d 796, 77 S. Ct. 752, 64 ALR 2d 288, (1957); *Konigsberg v. State Bar*, 353 U.S. 252, 1 L. ed. 2d 810, 77 S. Ct. 722 (1957); *People ex rel Chicago Bar Ass'n v. Goodman*, 366 Ill. 346, 8 N.E. 2d 941, 111 ALR 1, cert. den. 302 U.S. 728, 82 L. ed. 562 (1937). The outer limits of the protected activities under the First and Fourteenth Amendments beyond which the state has full regulatory power are indicated in the paragraph of this Court's opinion following the quotation set forth by petitioner at p. 23 of its brief. Therein this Court said:

> "* * * Here what Virginia has sought to halt is not a commercialization of the legal profession which might threaten the moral and ethical fabric of the administration of justice. It is not 'ambulance chasing.' The railroad workers, by recommending competent lawyers to each other, obviously are not themselves engaging in the practice of law, nor are they or the lawyers whom they select parties to any soliciting of business. * * *" (377 U.S. 6, 7).

It is clear from the foregoing that this Court meant to and did hold in *Brotherhood* that a restraint against a un-

ion from the "practice of law" does not involve encroaching upon constitutionally protected activities within the First Amendment guarantees of free speech, petition and assembly.

b. Informing lawyers that an accident had happened and furnishing the names and addresses for the purpose of obtaining legal employment for any lawyer.

The sum and substance of the opinions of this Court in *Brotherhood* and later in *Mine Workers* is that a union's activity is constitutionally protected in advising its members to consult specific attorneys or, as was the case in *Mine Workers,* retaining an attorney to represent its members who need legal representation and defraying the expenses of the same. This activity by the union is the extent of and beyond which the union may not go in carrying out its plan as to the recommendation of particular attorneys and, even though such activities result in the "channeling of cases to certain attorneys" such activities are constitutionally protected. Beyond that, the protection ceases. Nowhere did this Court sanction the dissemination by the union of the names of the injured members to attorneys in order to facilitate the commercialized solicitation of claims from such members. The Supreme Court of Appeals of Virginia in 207 Va. at 191, after quoting the following sentence from this Court's opinion in *Brotherhood,* 377 U.S. at 8 "And, of course, lawyers accepting employment under this constitutionally protected plan have a like protection which the state cannot abridge", then went on to say:

> "* * * We take this statement as indicating that the Brotherhood's activities, which were held constitutionally protected under the facts of this case, do not preclude a lawyer from *accepting* employ-

ment. We do not interpret the statement as denying the State's power to enjoin or discipline attorneys who are parties to solicitation of their employment." (207 Va. 191)

Respondent agrees, as did the Michigan court, that the holding of this Court that lawyers accepting employment unler this constitutionally protected plan have a like protection which the state cannot abridge does not sanction traditionally unethical activity on the part of lawyers in solicitation of professional employment. The prohibited activity approved by the Virginia court and likewise approved by the Michigan court clearly facilitates solicitation of claims upon a mass or commercial basis as pointed out earlier in respondent's Brief in Opposition. Petitioner refers to the American Bar Association's Code of Professional Responsibility and particularly Canon 2 and the Ethical Considerations and Disciplinary Rules adopted thereunder, particularly Disciplinary Rule 2-103 D (5) and notes that the code has been adopted by the Illinois Supreme Court. Although the Michigan Supreme Court has not yet acted on the code the respondent herein in October presented to that court its recommendations that the code be adopted in this state with certain slight modifications none of which apply to Disciplinary Rule 2-103. Inasmuch as this Court has granted certiorari in this case respondent does agree with petitioner on the one point: —that this Court should, in its opinion in this case, "speak out in language that cannot be misinterpreted or distinguished" (Pet. Br. p. 26) so that the entire legal profession may know the extent to which it may cooperate with legal services programs "• • • but only in those instances and to the extent that controlling constitutional interpretation at the time of the rendition of the services requires the allowance of such legal service activities, • • •" (see Disciplinary Rule D-103 D (5)).

c. Stating or suggesting that a recommended lawyer will defray expenses of any kind or make advances for any purpose to such injured persons or their families pending settlement of their claim.

The limits of the constitutionally protected activity of the union terminates upon recommendation. See the *Brotherhood* opinion (377 U.S. at 94) where, in the penultimate paragraph, this Court summarizes its holding as follows:

> "We hold that the First and Fourteenth Amendments protect the right of the members through their Brotherhood to maintain and carry out their plan for advising workers who are injured to obtain legal advice and for recommending specific lawyers."

There is nothing therein to indicate a sanctioning of any further activity on the part of the union to induce its members to select the recommended lawyers by "stating or suggesting" that the recommended lawyer will "defray expenses of any kind or make advances for any purpose." Petitioner states the issue squarely when it says "Generally, such advances have been held illegal only when they are used as an inducement to a retainer for any attorney." (Br. p. 26) This is exactly the activity that is restrained by this provision of the injunction. To argue as petitioner does on pages 26-27 of its brief that such payments after retainers are permitted, citing an Illinois Appeal's Court decision in support of the proposition, (*Mock v. Higgins,* 3 Ill. App. 2d 281, 121 N.E. 2d 865 (1954)) is completely beside the point. The activity to which this provision of the injunction is directed is the making of the statements or the suggestions to induce the retention of the recommended lawyers which clearly is not protected activity. In this connection, it should be noted that the Virginia Supreme Court of Appeals had great difficulty with the provisions of the

1965 revised decree of the Richmond Chancery Court after remand which had restrained the union from soliciting F.E.L.A. claims or "from doing any act or combination of acts that constitutes or amounts to the solicitation of legal employment for or on behalf of any lawyer, or conspiring to do so; * * *" but with the proviso that nothing therein contained should be construed to restrict the constitutional rights of the petitioner from recommending specific lawyers. The Virginia Supreme Court then said: "The decree thus draws the line between forbidden solicitation and permitted recommendation." (207 Va. at 187). The majority opinion of that court then went on to hold that the Chancellor's order thus too narrowly interpreted Justice Black's opinion and held that "The decree cannot stand in its present form." (207 Va. at 188) The difficulty of drawing such a line between solicitation and recommendation was evidenced, so said the Virginia court, by the insertion of the provisions into the decree that "purport to advise what is meant by 'solicitation'. The decree does not attempt to define 'solicitation'; it merely refers to source materials outside of the decree." By virtue of this and the lack of certainty in the decree the Virginia Supreme Court of Appeals felt the Chancellor's decree could not stand for indefiniteness. Although note was taken of the comment of the dissenting Justices of this Court (207 Va. 189, 190) wherein it was stated:

> "By its decision today the Court overthrows state regulation of the legal profession and relegates the practice of law to the level of a commercial enterprise. The Court permits a labor union—contrary to state law—to engage in the unauthorized practice of soliciting personal injury cases from among its membership on behalf of 16 regional attorneys whom its president has placed on the union's approved list.
>
> * * * * *

> "This state of affairs degrades the profession, proselytes the approved attorneys to certain required attitudes and contravenes both the accepted ethics of the profession and the statutory and judicial rules of acceptable conduct." (377 U.S. at 9)

the Virginia court nevertheless gives full approbation to the apparent holding of the majority, that even if the protected activity may be labelled "solicitation"—"We interpret the opinion as denying the State's right to restrain these activities." (207 Va. 189) As previously noted, (*supra* p. 10) Justice Carrico of the Virginia court forthrightly states that the majority opinion of his Court construed this Court's decision in *Brotherhood* as holding "that the union may engage in solicitation." (207 Va. 192) He then went on to say "The majority, then, has found something which the writer of that opinion failed to express in plain language and which others have found to be quite an illusive prey. See Comment, The Brotherhood case, 51 Va. Law Review 1963." (207 Va. at 192) Justice Carrico then concluded his dissent with the statement quoted *supra*, p. 9, that this Court "* * * if given the opportunity will say that it had no such intention." Thus, this case presents the "opportunity" that Justice Carrico opined probably would occur.

Respondent submits that Mr. Justice Black of the Michigan Supreme Court, the author of the majority opinion below, was completely correct when he stated, "The court, [Sup. Ct. App. of Va.] seeking conformity with the Supreme Court's 1964 opinion, analyzed it with manifest care and, we add, with the deferential respect subordinates owe to their constitutional superiors." (A. 209) The footnote following this statement comments upon the somewhat critical treatment of the majority opinion in the Virginia Law Re-

view Article, "The Brotherhood case", 51 Va. L. Rev. 1693, which is referred to in Justice Carrico's dissenting opinion. This Comment, whose author is apparently cloaked in anonymity, points up the need for clarification by this Court to dispel the confusion resulting therefrom. It is that author's comment that "In line with its failure to make clear whether the states have the power to regulate 'advising' and 'recommending' the court neglected to define 'solicitation' even though its balancing language implies that a state could prohibit the solicitation of business for lawyers." (51 Va. L. Rev. 1696) The author of the article then goes on to state that which is quoted in Michigan Supreme Court Justice Black's footnote (A. 209) referred to *supra p.* 16 and continues on with the following:

> "The state has a clear interest in regulating a plan whereby a lay organization directs all injured members to specific attorneys. Although an interest of the Bar in discouraging concentration of an organization's 'business' in the hands of a few attorneys is hardly a compelling reason for restricting members' freedom of speech and association, the intimate relationship between the designated attorneys and organization officials can readily lead to abuses detrimental to the legal profession. The record in the instant case clearly indicates how easily ambulance chasing and fee-splitting can become realities under a plan such as the Brotherhood's. Furthermore, even though no financial ties exist between the attorney and the organization, his dependence upon organization officials in retaining his position as designated counsel could result in a conflict of loyalty which would interfere with the attorney-client relationship. And even in the absence of specific abuses, the state has an interest in preserving the profession's tradition of independence. A plan such as the Brotherhood's threatens this tradition by channeling all members

> to the same attorney, thereby transforming the attorney into the representative of a parochial constituency."

The enjoined activities here are directed to and only to that type of activity within the framework of the meaning of the word "solicitation" which diverts money to certain lawyers, stimulates litigation or otherwise achieves "a commercialization of the legal profession which might threaten the moral and ethical fabric of the administration of justice." (377 U.S. 6)

d. Controlling, directly or indirectly, the fees charged or to be charged by any lawyer.

In *Mine Workers* (389 U.S. 217, 19 L. ed. 2d 426 (1967)), the Supreme Court held that the union could properly retain an attorney on a salary basis to represent its members and thus avoid the problem of exorbitant contingent fees. By so doing, it does not follow that this Court sanctioned the control by the union of fees that were directly charged by the attorney to his client. Somehow petitioner claims that the retention of such an attorney on a salary basis is in effect a violation of this injunctive restraint. On the contrary the employment of an attorney or attorneys on a salary basis by the union is not an example of ultimate control of the fees but rather a substitute for or elimination of all direct fees charged by the attorney to the client. Rather than directing its discussion to this provision, petitioner in its brief (p. 27) makes the spurious contention that this provision "relates to the practice of limiting the union lawyers' fee to a maximum of 25% which was in existence before the Illinois decision." The statement is then made that this limitation has now been removed and that legal counsel charged various percentages in their contingent fee contracts. All of this is completely beside the point

and has nothing to do with the constitutional validity of this provision in the injunction of the Michigan court which had the mature consideration and review of the Virginia Supreme Court of Appeals, the trial court in this case and thereafter the Michigan Supreme Court upon affirmance of the trial court's injunctive judgment.

e.-g. Accepting or receiving compensation for solicitation of legal employment for any lawyer; sharing in legal fees; and sharing in any recovery.

An examination of the opinions in *Button, Brotherhood* and *Mine Workers* demonstrate that the acceptance of a retainer by an attorney stemming from protected activities of the union is constitutionally protected. As stated in *Brotherhood,* (377 U.S. at 8) "* * * of course, lawyers accepting employment under this constitutionally protected plan have a like protection which the state cannot abridge." This Court in those decisions did not sanction conduct by an attorney which traditionally has been held to be unethical or illegal.[1] Moreover, these decisions did not sanction any payment by the attorney to the union in return for its recommendation to its members that he be sought out and retained. Any such activity was not involved in the consideration of this Court in any of the foregoing three cases and was not considered, to say nothing of being sanctioned in the opinions in those cases.

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[1] For instance, as this Court pointed out in *Button* (371 U.S. at 423) statutory regulation of unethical and nonprofessional conduct by attorneys had been in force in Virginia since 1849, including the outlaw of solicitation of legal business in the form of "running" or "capping". However, in 1956, an attempt was made to proscribe the activities of the N.A.A.C.P. by amending the statute to include within the definition of "runner" or "capper" an individual or organization which retains a lawyer in connection with an action to which it is not a party and in which it has no pecuniary right or liability.

Petitioner has grouped together these three provisions of the injunction below and discusses them together, hence we do likewise. Petitioner contends that these injunctive restraints relate to a "supposed profit obtained by the union through the operations of its legal services plan." (Br. p. 27) Regardless as to whether these provisions attempt to restrain a so-called "supposed profit" or an actual profit, such restraints are proper and do not invade constitutionally protected activities as any financial gain for the union as a result of the operation of the plan of recommending and thus the channelling of business to the recommended attorneys was not sanctioned by this Court in either *Button*, *Brotherhood* or *Mine Workers*. Hence such restraint, as determined to be valid by the Virginia Supreme Court of Appeals and later by the Michigan Supreme Court below in this case is a proper exercise of the state's broad powers to regulate the practice of law within its borders. (377 U.S. at 7) The decisions of this Court, first in *Button*, followed by *Brotherhood* and later in *Mine Workers* held that the activities of a union in recommending the hiring of specific legal counsel or the retaining of an attorney on a salary basis to represent the members of the union or organization or group, motivated, as indicated in the records in those cases, by genuine concern on the part of the union, organization or group for the welfare of its members, was a constitutionally protected form of free speech, petition and assembly. However, nothing can be gleaned from the opinions in those cases that this Court considered that such conduct was sanctioned when the motivation was the desire for financial gain. When any such motivation existed, this obviously could not be related to an exercise of the constitutional privilege of free speech guaranteed by the First Amendment.

All restraints contained in these final three provisions of the injunction in this and the prior Virginia decree are

directed toward prohibiting improper financial relations between a lay agency and its favored attorneys and/or fee splitting. All of such have traditionally been a subject of proper regulation by the states and beyond and outside of constitutionally protected activities under the First and Fourteenth Amendments.

II.

THE INJUNCTIVE JUDGMENT ENTERED IN 1968 UPON REMAND FROM THE MICHIGAN SUPREME COURT WITHOUT THE TAKING OF ADDITIONAL TESTIMONY DOES NOT VIOLATE DUE PROCESS.

In footnote 5 appearing on pages 15-16 of respondent's Brief in Opposition to the petitioner's Petition for Writ of Certiorari herein sets forth in an abbreviated and comparative form the provisions of the 1968 Decretal Judgment as compared to the 1962 decree. For ready reference, we are attaching a copy thereof as an appendix to this brief. (See appendix attached at p. 27 hereof). As therein indicated, the 1962 decree restrained the defendants[2] from six specific

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[2] When the 1962 decree was entered there were a number of named individual defendants who were union officers and members and that decree enjoined not only the union but the named individual defendants. After remand from the Michigan Supreme Court, at the May 24, 1968 hearing before the trial court, that court took note of the fact that there was pending before it two motions to dismiss the case as to all individually named defendants with the exception of three. The court, accordingly, granted the motions to dismiss and stated that because the case was a class action and there were only three remaining individual defendants, he "hereby, *sua sponte*, orders this matter dismissed as to the remaining three also." The court then goes on to state: "So there will be no misunderstanding, the remaining defendants herein are The Brotherhood of Railroad Trainmen and all members, agents and officers of The Brotherhood of Railroad Trainmen in the State of Michigan." (A. 175)

types of activities delineated a. through f. (A. 117-118) That decree was based upon admissions in the pleadings (A. 36-51, 54) and evidence introduced at the trial (A. 55-60, 63-106, 120-169) following which an opinion was filed by the trial court making findings based thereon. (A. 109-112) Following this decision the 1962 decree was entered. (A. 113-118) Encompassed within five of these six restrained activities are all of the specific acts restrained in the 1968 Decretal Judgment.

The argument is made on page 33 of petitioner's brief that the restrained activities in the 1962 decree are not predicated on "findings of fact unless one accepts the Chancellor's belief that he was entitled to enjoin the Brotherhood on the basis of statements made in other cases." This is not a valid claim of a deprivation of procedural due process by the Michigan courts in violation of the Fourteenth Amendment to the U.S. Constitution. Rather it is a claim that the trier of the facts arrived at an erroneous conclusion. It is, of course, fundamental that the due process clause of the Fourteenth Amendment does not control forms of procedure or practice in state courts unless fundamental principles of hearing and notice are affected. *16 Am. Jur. 2d*, Cons. Law Sec. 549, p. 943-4. The jurisdiction of this Court under the Fourteenth Amendment was definitely ruled upon and determined on this issue in the case of *Bell Telephone Company of Pennsylvania v. Pennsylvania Public Utility Commission*, 309 U.S. 30, 84 L. ed. 563 (1940) where the following appears:

> "In the absence of other constitutional objections, it cannot be said that a state court denies due process when on appropriate hearing it determines that there is evidence to sustain a finding of the violation of state law with respect to the conduct of local affairs. The contention that such a decision is erroneous does not present a federal ques-

tion. *Arrowsmith v. Harmoning*, 118 US 194, 196, 30 L. ed. 243, 6 S. Ct. 1023; *Bonner v. Gorman*, 213 US 86, 91, 53 L. ed. 709, 711, 29 S. Ct. 483; *American R. Exp. Co. v. Kentucky*, 273 US 269, 273, 71 L. ed. 639, 641, 47 S. Ct. 353."

In the first of the cases cited in the above quotation *Arrowsmith v. Harmoning*, 118 U.S. 194, 30 L. ed. 243, decided in 1886, Chief Justice Waite stated the obligation of the states under the Fourteenth Amendment with which no serious question has ever since been voiced, in words as follows:

> "• • • Certainly, a State cannot be deemed guilty of a violation of this constitutional obligation simply because one of its courts, while acting within its jurisdiction, has made an erroneous decision. • • •"

As respondent stated in its Brief in Opposition, the cases cited by petitioner in support of its position that procedural due process had been denied in this case are not applicable. As we pointed out (Br. in Oppos. p. 16-18), *State of Wyoming v. State of Colorado*, 286 U.S. 494, 76 L. ed. 1250 (1932) involves the construction of and breadth of an injunction entered in an earlier suit between the parties, this being an original proceeding in this Court brought by the State of Wyoming against the State of Colorado. Accordingly, no issues involving the question as to a state's alleged deprivation of rights of its citizens to procedural due process under the Fourteenth Amendment was involved. Likewise, in *N.L.R.B. v. Express Publishing Company*, 312 U.S. 426, 85 L. ed. 930 (1941) and *Communication Workers of America, AFL-CIO v. N.L.R.B.*, 362 U.S. 479, 4 L. ed. 2d 896 (1960) the questions before the court were the power of a federal court to restrain acts in violation of the National Labor Relations Act. The quotations from the

opinions in those cases appearing on p. 17-18 of respondent's former brief clearly show the issues there before the court and that such are entirely foreign to the question of procedural due process under the Fourteenth Amendment. Petitioner now says (Br. p. 36-37) that it did not cite those cases "for that proposition, but were cited because the issue of constitutional procedural due process arises in every instance where the record discloses that no such charges, nor proof, were made prior to or during the 1961 hearing." The holding of this Court in *Bell Telephone Company of Pennsylvania v. Pennsylvania Public Utility Commission, supra,* disposes of petitioner's contention in this regard. Further, the lengthy quotation from *N.L.R.B. v. Express Publishing Co., supra,* set forth on p. 37-38 of petitioner's brief clearly shows that the issue there before the court was the scope of and specificity of the order of the Board which had properly entered an order against an employer to cease and desist from refusing to bargain but this Court held that a finding of a violation in that respect did not justify the making of a blanket order restraining the employer from violating the statute in any manner whatsoever. As the court stated in the quoted excerpt, the reasons for specificity are that "when judicially confirmed, the courts may be called on to enforce by contempt proceedings, [accordingly, the order] must, like the injunction order of a court, state with reasonable specificity the acts which the respondent is to do or refrain from doing." This issue is not the case here.

Petitioner again cites *In re Ruffalo*, 390 U.S. 544, 88 S. Ct. 1222, 20 L. ed. 2d 117 (1968)[1] as support for the contention that "the conduct of the Michigan courts is so offensive to the ordinary standards of justice as to amount to a denial

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[1] Petitioner erroneously cites this case, not only in its petition, but again in its brief as 20 L. ed. 117.

of procedural due process." (Br. p. 38-39). As we pointed out earlier in our Brief in Opposition, the lack of procedural due process found by this Court in *Ruffalo* was that during the hearing before the Ohio Disbarment Proceedings the principal charge upon which the respondent attorney was found guilty and disbarment ordered was added to the specification of charges during the course of and on the third day of the trial. In the instant case, all of the charges with which the defendants were charged in the original complaint and at the subsequent trial were all ultimately found to warrant the issuance of an injunction in this case, the terms of which were duplicative of the final Virginia decree. Nothing in the instant case can be termed as a "trap" to the defendant as this Court likened the Ohio disciplinary proceedings in *In re Ruffalo* when, as the court stated, after the proceedings "* * * are under way, the charges are amended on the basis of testimony of the accused." The essential factual situation in that case is clearly distinguishable from and the decision therein no precedent in the instant case.

The decision in *Willner v. Committee On Character & Fitness*, 373 U.S. 96, 83 S. Ct. 1175, 10 L. ed. 2d 224, 2 ALR 3d 1254 (1963) is likewise not in point. In that case no hearing was ever had at which Willner was confronted with the evidence that formed the basis for the decision of the *Committee On Character & Fitness* as to his lack of qualifications to be admitted to the bar of the State of New York, nor could he determine what such evidence was. Willner had passed the bar examinations in 1936 and two years later, the Committee had filed with the New York Appellate Division its determination that it was not satisfied that *Willner* possessed the character and general fitness requisite for an attorney and counsellor at law. During the following 22 years, Willner continually endeavored to qualify for admis-

sion to the bar including the making of five applications to the New York Appellate Division all of which were denied without an opinion. The crux of the decision of this Court is found in the final paragraph of the opinion as follows:

> "We hold that petitioner was denied procedural due process when he was denied admission to the Bar by the Appellate Division without a hearing on the charges filed against him before either the Committee or the Appellate Division."

No such denial of a hearing of any kind occurred in the instant case.

CONCLUSION

For the reasons above stated, respondent respectfully submits that the judgment below and the opinion and decision of the Michigan Supreme Court should be affirmed.

Respectfully submitted,

A. D. RUEGSEGGER,
Suite 1500, One Woodward Ave.,
Detroit, Michigan 48226

PHILLIP C. KELLY,
KELLY, KELLY & KELLY,
210 West Franklin Street,
Jackson, Michigan 49201
Attorneys for Respondent.

Of Counsel:
Louis Rosenzweig,
600 Woodward Ave.,
Detroit, Michigan 48226

APPENDIX

1968 Decretal Judgment	*1962 Decree*
(Full text at A. pp. 176-177)	(Full text at A. pp. 113-118)
1. Giving or furnishing legal advice to its members or their families	a. Telling any person or his representatives that said person has a cause of action, the amount he is entitled to recover, where suit should be filed, or doing any other act or thing which constitutes the practice of law within the State of Michigan;
2. Informing any lawyer or lawyers that an accident has been suffered by a member or non-member of the said Brotherhood and furnishing the name and address of such injured or deceased person for the purpose of obtaining legal employment for any lawyer.	b. Negotiating or attempting to negotiate contracts of employment for legal services on behalf of any lawyer or lawyers;
	d. Making unsolicited calls upon any person for the purpose of soliciting contracts for the employment of a lawyer by such person, or for the purpose of recommending or urging the employment of any particular lawyer or group of lawyers by such person.
	e. Engaging in any activity, conduct or endeavor condemned by the Supreme Court of Illinois in *In Re Brotherhood of Railroad Trainmen,* 150 Northeastern Reporter 2nd, 163.

3. From stating or suggesting that a recommended lawyer will defray expenses of any kind or make advances for any purpose to such injured persons or their families pending settlement of their claim.	e. See text of e. above.
4. Controlling, directly or indirectly, the fees charged or to be charged by any lawyer.	b. and e. See above for texts of b. and e.
5. From accepting or receiving compensation of any kind, directly or indirectly, for the solicitation of legal employment for any lawyer, whether by way of salary, commission or otherwise.	c. Accepting pay or any gratuity or benefit whatsoever, directly or indirectly, from any lawyer, person or organization for services in obtaining contracts of employment for legal services; and e. above.
6. From sharing in any manner in the legal fees of any lawyer or countenancing the splitting of or sharing in such fees with any laymen or lay agency.	c. and e. See above for texts of c. and e.
7. From sharing in any recovery for personal injury or death by gift, assignment or otherwise.	c. and e. See above for texts of c. and e.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 434.—October Term, 1970

United Transportation Union, Petitioner, *v.* The State Bar of Michigan. } On Writ of Certiorari to the Supreme Court of Michigan.

[April 5, 1971]

Mr. Justice Black delivered the opinion of the Court.

The Michigan State Bar brought this action in January 1959 to enjoin the members of the Brotherhood of Railroad Trainmen [1] from engaging in activities undertaken for the stated purpose of assisting their fellow workers, their widows and families, to protect themselves from excessive fees at the hands of incompetent attorneys in suits for damages under the Federal Employers' Liability Act.[2] The complaint charged, as factors relevant to the cause of action, that the Union recommended selected attorneys to its members and their families, that it secured a commitment from those attorneys that the maximum fee charged would not exceed 25% of the recovery, and that it recommended Chicago lawyers to represent Michigan claimants. The State Bar's complaint appears to be a plea for court protection of unlimited legal fees. The Union's answers admitted that it had engaged in the practice of protecting members against large fees and incompetent counsel; that since 1930 it had recommended, with respect to FELA claims, that injured member employees, and their families, con-

[1] On January 1, 1969, after the decree was entered in the court below, the Brotherhood of Railroad Trainmen merged into a newly created union, the United Transportation Union. The successor union is the petitioner in this case.

[2] 35 Stat. 65, as amended, 45 U. S. C. §§ 51–60.

sult attorneys designated by the Union as "Legal Counsel"; that prior to March 1959, it had informed the injured members and their families that the legal counsel would not charge in excess of 25% of any recovery; and that Union representatives were reimbursed for transporting injured employees, or their families, to the legal counsel offices.

The only evidence introduced in this case was the testimony of one employee of the Association of American Railroads in 1961 that from 1953 through 1960 a large number of Michigan FELA claimants were represented by the Union's designated Chicago legal counsel. Based on this evidence and the Union's admissions set out above, the state trial court in 1962 issued an order enjoining the Union's activities on the ground that they violated the state statute making it a misdemeanor to "solicit" damage suits against railroads.[3] The Union appealed to the Michigan Supreme Court, but before the case was argued on appeal, this Court handed down its decision in *Brotherhood of Railroad Trainmen* v. *Virginia State Bar*, 377 U. S. 1 (1964), involving a similar injunction secured by the Virginia State Bar against the Union. We held in that case that the First Amendment guarantees of free speech, petition, and assembly give railroad workers the right to cooperate in helping and advising one another in asserting their rights under the FELA. While not deciding every question that possibly could be raised, our opinion left no doubt that workers have a right under the First Amendment to act collec-

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[3] Section 28.642, Mich. Stat., in relevant part provides:

"Any person, . . . or organization of any kind, either incorporated or unincorporated, . . . who shall directly or indirectly, . . . solicit any person injured as the result of an accident . . . for the purpose of representing such person in making claim for damages . . . shall be guilty of a misdemeanor . . . ."

tively to secure good, honest lawyers to assert their claims against railroads.

Acknowledging our decision in *Trainmen*, the Michigan Supreme Court remanded the instant case to the state trial court with permission for amendment of the complaint "to seek, if it be so advised, relief not inconsistent with the Supreme Court's said opinion." 374 Mich. 152, 155, 132 N. W. 2d 78, 79. After remand, the State Bar made a motion for further proceedings. That motion was heard on February 5, 1965, at which time the Bar declined to amend its complaint. For reasons not explained in the record, the case lingered in the trial court until May 24, 1968. On that date, after a motion for judgment by the State Bar and arguments on the motion, the trial court adopted verbatim the injunction entered in the Virginia state courts after our remand in *Trainmen*.

In affirming the trial court decree, the material part of which is set out below,[4] the Michigan Supreme Court gave our holding in *Trainmen* the narrowest possible

[4] The decree entered by the Michigan trial court permanently restrained and enjoined the Union:

"from giving or furnishing legal advice to its members or their families; from informing any lawyer or lawyers that an accident has been suffered by a member or non-member of the said Brotherhood and furnishing the name and address of such injured or deceased person for the purpose of obtaining legal employment for any lawyer; from stating or suggesting that a recommended lawyer will defray expenses of any kind or make advances for any purpose to such injured persons or their families pending settlement of their claim; from controlling, directly or indirectly, the fees charged or to be charged by any lawyer; from accepting or receiving compensation of any kind, directly or indirectly, for the solicitation of legal employment for any lawyer, whether by way of salary, commission or otherwise; from sharing in any manner in the legal fees of any lawyer or countenancing the splitting of or sharing in such fees with any layman or lay agency; and from sharing in any recovery for personal injury or death by gift, assignment or otherwise."